

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
CRESCENT MACHINERY,	§	CASE NO. 02-41005-DML-11
	§	
E. L. LESTER COMPANY, INC.,	§	(JOINTLY ADMINISTERED)
	§	
Debtors	§	CHAPTER 11
	§	
<hr style="border: 0.5px solid black;"/>		
	§	
THE ESTATES OF CRESCENT	§	
MACHINERY AND E. L. LESTER,	§	
INC.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	Adversary Proceeding No. 03-04024
MARK ROBERSON, JEFFREY	§	
STEVENS, GERALD HADDOCK	§	
RICK KNIGHT AND CRESCENT	§	
OPERATING, INC.	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

On March 3, 2003, the court heard oral argument on Plaintiff's Motion for Remand and Motion to Abstain (the "Motion"). In considering the Motion the court has reviewed the Motion, Defendant's Response to Plaintiff's Motion to Remand and Motion to Abstain (the "Response"), the reply of Plaintiff (the "Reply"), as well as, all other filings to date in this adversary proceeding and such additional pleadings as have been referenced in argument, the Motion, the Response, and the Reply. The court exercises jurisdiction granted to it by 28 U.S.C. § § 1334 (a), (b) and (c) and 157 (a) and (b)(3).

This matter is governed by FED. R. BANKR. P. 9014 (*see* FED. R. BANKR. P. 9027(d)), and this memorandum opinion constitutes the court's findings of fact and conclusions of law. FED. R. BANKR. P. 9014 and 7052.

I. Background

Crescent Operating, Inc. ("COPI") was formed by Crescent Real Estate Equities Company and its subsidiary Crescent Real Estate Equities Limited Partnership to be the lessee and operator of certain assets owned or to be acquired by the two companies which the companies could not operate directly without jeopardizing their status as real estate investment trusts. As a result of subsequent transactions undertaken by COPI, by December 31, 2001, COPI had become the owner of Crescent Machinery Corporation, Inc. ("CMC") which was in the business of equipment sales and leasing, and E.L. Lester Company ("Lester" and, collectively with the CMC, the "CMC Debtors"), a construction equipment sales, leasing and service company with locations in several states.

By the end of 2001, the CMC Debtors annual sales approximated \$100,000,000. However, the business was unprofitable. Following efforts at out of court restructuring, on February 6, 2002, the CMC Debtors filed voluntary petitions under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101 *et seq.*

On February 21, 2002, pursuant to 11 U.S.C. § 1102(a)(1), the United States Trustee appointed the Official Committee of Unsecured Creditors (the "Committee") to represent the interests of unsecured creditors in this case. Following an initial investigation, the Committee sought authority to act as representative of the CMC Debtors' estates to commence certain litigation against insiders. On May 14, 2002, the court entered an order authorizing the Committee to bring suit on such claims in the name

of the CMC Debtors. *See, e.g., Louisiana World Exposition v. Federal Ins. Co.*, 858 F.2d 233 (5th Cir. 1988).

On December 19, 2002, the Committee filed a suit against Mark Roberson (“Roberson”), Jeffrey Stevens (“Stevens”), Rick Knight (“Knight”), Gerald Haddock (“Haddock”)¹ (the “Individual Defendants”) and Crescent Operating, Inc. (“COPI” and, together with the Individual Defendants, the “Defendants”) in the 352nd Judicial District Court of Tarrant County, Texas (the “Suit”). In the Suit, the Committee alleges mismanagement of the CMC Debtors and various breaches of fiduciary duty by Defendants during the time they controlled the CMC Debtors. COPI removed the Suit to the United States District Court for the Northern District of Texas, Fort Worth Division, on January 17, 2003, pursuant to 28 U.S.C. § 1452 and Fed. R. Bankr. P. 9027. The Suit was thereafter transferred to this court pursuant to the Standing Order of Reference. On February 7, 2003, 18 days following the removal, the Committee filed the Motion.² On March 11, 2003, COPI (as it had indicated it would in its filings and during oral argument) filed its own chapter 11 petition in this court.

In the Motion the Committee argues that abstention by this court with respect to the Suit is mandatory under 28 U.S.C. § 1334(c)(2) because the Committee’s state law claims are merely related to the bankruptcy proceeding and did not arise under Title 11 or

¹ Roberson, Stevens, Knight and Haddock served as officers or directors of COPI or CMC.

² The court need not address whether the Motion was timely. *See* FED. R. BANKR. P. 9027(e)(3).

in a case under Title 11 and therefore the claims are not core proceedings. At oral argument, the Committee reurged this position and, *inter alia*, that COPI's impending bankruptcy filing would not have the effect of creating counterclaim jurisdiction over the Suit in this court. 28 U.S.C. § 157(b)(2)(C).

In the Response, COPI pointed to its plan to file chapter 11, arguing that the Suit could be viewed as a counterclaim in its anticipated reorganization case giving rise to this court's jurisdiction, that CMC³ would be forced to file a proof of claim in COPI's impending bankruptcy in order to preserve its claim as stated in the Suit, and that COPI would assert a counterclaim and setoff in the adversary proceeding against CMC. During oral argument, all Defendants indicated their submission to this court's jurisdiction and consent to entry by this court of final judgment in the Suit.

II. Discussion

The court concludes that it may and should retain this adversary proceeding. First, the Committee brought the Suit on behalf of the estate of the CMC Debtors and, therefore, has submitted to the jurisdiction of this court, thus obviating the questions of mandatory abstention and core jurisdiction. Second, the Suit is a significant asset being liquidated under the CMC Debtors' plan for the benefit of unsecured creditors. Third, the bankruptcy of COPI means the Committee's claim against COPI is subject to the court's jurisdiction in COPI's case.

Jurisdiction is not a matter of preference. A court should retain and hear matters properly brought before it. *Meredith v. City of Winter Haven*, 320 U.S. 228, 234, 64 S. Ct. 7, 11 (1943) ("...[it is] the duty of the federal courts, if their jurisdiction has

³ As a result of the plan confirmed for the CMC Debtors on March 14, 2003, the CMC Debtors were consolidated into CMC.

been properly invoked, to decide questions of state law whenever necessary to the rendition of judgment.” (citations omitted)); *Sayers v Forsyth Bldg. Corp.*, 417 F.2d 65, 73 (5th Cir. 1969); *In re Lafayette Radio Electronics Corp.*, 8 B.R. 973, 975-78 (Bankr. E.D.N.Y. 1981) (applying *Meredith v. City of Winter Haven* to cases under the Bankruptcy Code). The wishes of the judge or a litigant do not supercede this duty.

1. The CMC Debtors and, thus, the Committee Submitted to this Court’s Jurisdiction

The Committee, standing in the shoes of the CMC Debtors, seeks to keep this court from adjudicating this adversary proceeding. However, a debtor does not have the same ability a third party might have to avoid the bankruptcy court’s jurisdiction. Upon the filing of its chapter 11 petition, CMC and Lester became debtors in possession. As such, they exercised the powers and were required to perform the duties of a trustee. 11 U.S.C. § 1107. The Committee succeeded to the CMC Debtors’ position and, in prosecuting the Suit, therefore also acts in the capacity of a chapter 11 trustee.

A chapter 11 trustee is charged with the duty of liquidating the estate. 11 U.S.C. §§ 1106(a)(1) and 704(1). It is through performance of this duty, as debtors in possession with the duties and powers of a trustee, that CMC and Lester would pursue litigation belonging to the estate. 11 U.S.C. § 323(b). Again, the Committee’s posture must be the same.

Section 1107(a) of the Bankruptcy Code specifically reserves to the bankruptcy court the authority to set “such limitations or conditions” as it deems appropriate on the exercise by a debtor in possession of the powers of a trustee. This provision is tantamount to submission by a debtor to the jurisdiction of the bankruptcy court to

oversee its administration of the estate as debtor in possession. The Committee, acting as estate representative, assumed control of the Suit subject to the same oversight. It would be illogical to grant the bankruptcy court such power over the estate representative, yet, based only on the objection of that very representative, deny that court jurisdiction to hear a suit which is property of the estate.

Indeed, it is the very authority of the court over a debtor's liquidation of the estate which allows it, as was the case here, to empower another entity, such as the Committee, to perform the functions of the estate representative. *See e.g. In re Patton's Busy Bee Disposal Serv., Inc.*, 182 B.R. 681, 684 (Bankr. W.D.N.Y. 1995); *In re Carnegie Int'l Corp.*, 51 B.R. 252, 254 (Bankr. S.D. Ind. 1984)(discussing the underpinnings of bankruptcy court's authority to appoint third parties to pursue litigation on behalf of debtor in possession; *cf.* 11 U.S.C. § 503(b)(3)(B)). Were the court to elect to do so, it might—and in the event of appointment of a trustee for the CMC Debtors probably would—revoke the Committee's authority to prosecute the suit. Given the court's power to strip the debtor in possession of the ability to liquidate claims of the estate when appropriate and the court's evident authority to later substitute a different estate representative, the court clearly has the inherent power, where not prevented by entitlement of third parties to trial in another forum, to retain and hear those claims itself.⁴

While it is certainly reasonable that a bankruptcy court give deference to an estate representative-plaintiff's choice of forum in the pursuit of litigation, pursuant to section

⁴ *See In re Agent Systems, Inc. (Agent Systems, Inc. v. Capital Metropolitan Transit Auth.)*, No. 01-48402 (Bankr. N.D. Tex. 2002) (publication pending).

1107(a) the judge supervising the reorganization case nevertheless may ultimately make the judgment whether or not he should exercise his authority to hear the matter. Where, as here, (1) the suit in question is a significant potential asset; (2) the resolution of the suit is important to creditor recoveries; (3) the suit is now tied to COPI's chapter 11 case as well, the decision to exercise jurisdiction and retain control of the adversary proceeding is the patently correct result.⁵

2. The COPI Chapter 11

Whether the filing of COPI's chapter 11 conferred core jurisdiction over the Suit on this court may be subject to question. What is certain is that the filing by COPI will prevent prosecution of the Suit in state court absent relief from the automatic stay in COPI's case. 11 U.S.C. § 362(a)(1). The Committee has argued in the Motion that trial in state court would occur as soon as it might in this court. Even if that were previously so, and the court has its doubts,⁶ COPI's chapter 11 case adds a complication which is best resolved by this court hearing the suit.

III. Conclusion

This court believes the reorganization process in this chapter 11 case is best served by its retention of this adversary proceeding. The Committee has presented no cogent reason why another court would be better suited to try this case. There was no significant activity in the state court prior to removal, nor has the state court special

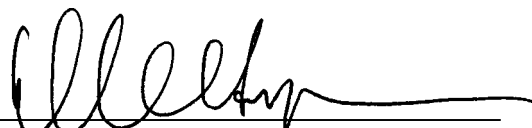
⁵ The case at bar is obviously distinguishable from *In re Southmark Corp.*, 163 F.3d 925 (5th Cir. 1999), cert. denied 527 U.S. 1004 (1999), in which the debtor was pursuing a malpractice claim following confirmation of its plan. *Southmark* involved the *private* rights of the debtor; the case before the court implicates the *public* right exercised in liquidation of estate property for the benefit of creditors.

⁶ This court has set trial docket call of the Suit for June 2, 2003. Only if the parties are not yet ready (or the COPI automatic stay remains in place) will trial occur long after that date. The Committee, in the Motion, offers the prospect of a far more remote time for trial in state court.

familiarity with the facts at issue. Having initiated the Suit on behalf of debtors in possession, the conduct of the adversary proceeding is subject to the court's authority. Defendants have consented to entry of judgment in the Suit by this court. Given the adversary proceeding's important part in satisfaction of creditors and COPI's related bankruptcy, the Suit is properly before this forum. Accordingly, the Motion is DENIED.

It is so ORDERED.

Signed this the 19th of March 2003.



DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE